

# Lawyers' Rights Watch Canada

*NGO in Special Consultative Status with the Economic and Social Council of the United Nations  
Promoting human rights by protecting those who defend them*

## **International Right to Legal Aid In relation to the British Columbia Missing Women Commission of Inquiry**

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### **Purpose:**

1. The purpose of this Report is to set out the principles of international human rights law of which establish and affirm the obligation of states to provide legal aid to ensure equal access to justice for all individuals or groups without discrimination as they relate to denial of the right to legal aid for victims and their advocates with standing before the British Columbia Missing Women Commission of Inquiry.

### **Background**

2. The question of gender and race-based discrimination faced by Aboriginal women and girls has been an ongoing issue in Canada for many years, as has the crisis of missing and murdered Aboriginal women and girls in the province of British Columbia. On September 27, 2010 the B.C. government established the Missing Women Commission of Inquiry. The mandate of the Commission was to conduct hearings, inquire into and make findings of fact with respect to the conduct of police investigations between January 23, 1997 and February 5, 2002, concerning dozens of missing women and suspected multiple homicides in the downtown east side of Vancouver.

3. The Commissioner granted standing to a number of human rights organizations including key aboriginal groups who applied to participate in the hearing and recommended to the government that these groups be publicly funded according to their level of participation in the hearing. For the Commissioner, without such funding, they would not be able to meaningfully participate in the inquiry.

4. The B.C. government provided public funding for a number of lawyers representing the police and justice system officials before the Commission and for two lawyers for some of the families of the murdered women. But refused to fund aboriginal and other organizations that served women in the Vancouver downtown east side who had been granted standing before the Commission.

5. The government's position was that it only provides legal representation outside the legal aid program in very rare circumstances where *Charter* rights are engaged or the outcome of a proceeding is likely to affect an individual's rights, liberty or security. The result was that all but

two of the groups granted standing withdrew from the inquiry. The Commission released its Report on December 18, 2012.

6. In December 2011, the *Committee on the Elimination of Discrimination Against Women (CEDAW)* announced that it had initiated an inquiry under Article 8 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* following a request to do so by two groups, the Native Women's Association of Canada and the Canadian Feminist Alliance for International Action. CEDAW has designated two experts to visit Canada in September 2013 to carry out an inquiry on the issue of missing and murdered Aboriginal women in Canada.<sup>1</sup>

7. In general, discussions of legal aid in Canada are framed by domestic considerations rather than by international human rights law. The legal obligation to provide legal aid is found in Canada's *Charter of Rights and Freedoms* and other domestic laws. The provision and funding of legal aid is the responsibility of the province in all areas of its jurisdiction.

8. The priority for legal aid is currently on certain civil and political rights for those charged with serious criminal offences as well as some other categories of civil and political rights. The emphasis on civil and political rights in *the Canadian Charter of Rights* has made it difficult to for people to access legal aid to seek enforcement of economic, social and cultural rights. Effective access to justice such as the availability of free public defense for persons without means are of inestimable value to ensure the enforceability of economic, social and cultural rights.

9. This submission demonstrates that Canada, including British Columbia, is bound by international law to provide whatever funding for legal aid is necessary to ensure the equal enjoyment of protected rights by all people including those without the money and other resources needed to determine or enforce rights or seek remedies for violations.

## **INTERNATIONAL HUMAN RIGHTS OBLIGATIONS: THE FOUNDATION AND FRAMEWORK FOR PROVISION OF LEGAL AID<sup>2</sup>**

10. Several international and regional human rights treaties recognize legal aid as an essential component for the exercise and enjoyment of the right to a fair trial and an effective remedy.

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<sup>1</sup> References: *Missing and Murdered Aboriginal Women and Girls in British Columbia and Canada, Briefing Paper for Thematic Hearing before the Inter-American Commission on Human Rights*, by the Native Women's Association of Canada, March 28, 2012; and, *Missing and Murdered Aboriginal Women and Girls in British Columbia and Canada*, submission to the United Nations Committee to Eliminate Racial Discrimination by Lawyers Watch Canada and B.C. CEDAW Group, January 2012.

*In preparing this Report, in addition to original research and the above References, the authorI also relied on International Law Obligations to Provide Legal Aid*, Lawyers Rights Watch Canada. January 2010. : *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights. A Review of the Standards Adopted by the Inter-American System of Human Rights. Report of the Special Rapporteur on the independence of judges and lawyers. 15 March 2013.*

<sup>2</sup> Note that the instruments selected for summary purposes are not exhaustive. Virtually all Conventions provide that States must provide remedies to assure rights.

11. As a member of the United Nations, Canada is bound by the treaties and Conventions it has ratified and recognizes the normative and persuasive importance of Declarations, Principles, and Resolutions adopted by the General Assembly.

12. As a member of the Organization of American States (OAS), Canada is bound by the *OAS Charter*. For OAS member states, the *American Declaration of the Rights and Duties of Man*<sup>3</sup> “constitutes a source of international obligations” and forms the “normative basis” for human rights protection in OAS states.

### **A. Universal Declaration of Human Rights**

13. International human rights law begins with the proposition that justice, freedom and peace depend on the universal recognition and enforcement of human rights and the rule of law. This truism is articulated in the Preamble to the 1948 *Universal Declaration of Human Rights (UDHR)*<sup>4</sup> that confirms the principle of the rule of law as the alternative to recourse to violence. **Article 2 guarantees the right to life, liberty and security of person. Article 3 declares that everyone is entitled to all the rights and freedoms set out in the UDNR without distinction of any kind.**

14. Although there is no explicit right to counsel contained in the *UDHR*, equal access to legal representation is fundamental to the enforcement of fundamental freedoms to equality before the law, effective remedies for human rights violations and fair trials in the determination of rights.

### **B. United Nations Treaties**

#### **B.1 Vienna Convention on the Law of Treaties**

15. The *Vienna Convention on the Law of Treaties* specifies that States parties are bound by their treaty obligations and all treaty obligations must be performed in good faith. (*pact sunt servanda*).<sup>5</sup> Article 27 of the Vienna Convention reads: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

16. Thus, under international human rights law, States not only have a negative obligation not to obstruct access to judicial and other remedies, but also have a positive duty to organize their domestic law to ensure that all persons can access those remedies.

17. In this regard, the Inter-American Court of Human Rights (IACtHR.), established under the *American Convention of Human Rights (American Convention)*, stated in *Forneron and Daughter v. Argentina*, that:

...a State that has acceded to an international convention must introduce into its domestic law the necessary modifications to ensure the execution of the obligations

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<sup>3</sup> *American Declaration on the Rights and Duties of Man*, OAS, Bogotá (1948), available at <http://www.cidh.org/basicos/english/Basic2.American%20Declaration.htm>.

<sup>4</sup> G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 13, UN Doc. 1/810 (1948) 71.

<sup>5</sup> Article 26 of the Vienna Convention on the Law of Treaties, entered into force on 27 January 1980. U.N.T.S. Vol. 1155, p. 331 [Vienna Convention].

it has assumed. In the American Convention, this principle is contained in its Article 2 which establishes the general obligation of each State party has to adapt its internal law to the provisions of the Convention in order to guarantee the right it recognizes.<sup>6</sup>

18. This was similarly expressed by the IACtHR in *Alosilla v. Peru*:

The obligation to comply with the decisions in the Court's judgments corresponds to a basic principle of the law of the international responsibility of the State, supported by international case law, according to which, States must comply with their international treaty obligations in good faith (*pacta sunt servanda*) and, as this Court has already indicated and as established in Article 27 of the 1969 Vienna Convention on the Law of Treaties, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The treaty obligations of the States Parties are binding for all the powers and organs of the State.<sup>7</sup>

19. This same principle was expressed by the IACtHR with reference to the American Convention of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>8</sup>

20. This is particularly relevant to Canada in which provinces have exclusive jurisdiction in many matters. UN human rights treaty bodies have consistently taken the position that all levels of government in Canada are responsible to implement international Conventions ratified by Canada on matters within their jurisdiction.

## **B.2 International Covenant on Civil and Political Rights (ICCPR)**

21. The *International Covenant on Civil and Political Rights* (ICCPR) entered into force on 23 March 1976, and 166 countries have ratified it. Canada ratified the ICCPR on 19 May 1976. As a State Party, Canada has a duty to guarantee, *inter alia*, equal access to effective remedies for human rights violations; to ensure equal protection of the law without discrimination; and to ensure the equal right of men and women to the enjoyment of all political and civil rights set out in the Covenant.

22. The right to legal aid is provided in Article 14(3)(d) which lists among the procedural guarantees for persons charged with a criminal offence, the right to “to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”

23. The ICCPR protects not only the rights of those charged with offences: it protects many other rights including the right to life, the right to security of the person and other civil and political

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<sup>6</sup> Case of Forneron and Daughter v. Argentina, Judgment of April 27, 2012, para. 139, p.37.

<sup>7</sup> Case of Abrill Alosilla et al Judgment of May 22, 2013, para. 4, p.2.

<sup>8</sup> Advisory Opinion OC-18/03, paras. 78-81, 167,171 and 172. See also Case of Gomes Lund et al v. Brazil, IACtHR, Judgment of November 24 2010, paras. 7,8.

rights. Canada and British Columbia are obligated to provide civil legal aid where it is necessary to enable equal access to actions to enforce protected rights or to secure remedies for violations.

24. The Human Rights Committee in its April 2006 review of Canada's performance ensuring rights protected by the ICCPR noted the inadequacy of remedies for violations of Articles 2, 3 and 26 of the Covenant. Of particular concern to the Committee was the significant number of violent deaths of Aboriginal women in Canada. In this context, the Committee expressed concern about Canada, saying "...that legal aid for access to courts may not be available"<sup>9</sup> to access the courts to seek redress for violations of the rights provided in the Convention.<sup>10</sup> The Committee expressed concern at the economic and social marginalization of Aboriginal women and their heightened risk of suffering violent deaths and recommended that Canada ensure Aboriginal women, "...effective access to the justice system."<sup>11</sup>

### **B.3 Convention on the Rights of the Child**

25. This Convention provides in Article 37(d) that every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. Although there is no reference to free legal assistance, the Committee on the Rights of the Child has so recommended in its general comment.<sup>12</sup>

### **B.4 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)**

26. Article 18 of the ICRMW recognizes that any migrant workers and members of their families charged with a criminal offence shall be entitled to be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay.

### **B.5 International Covenant on Economic, Social and Cultural Rights (ICESCR)**

27. Canada is among the 160 nations that have ratified the *ICESCR*. British Columbian poverty advocates, Gwen Brodsky and Shelagh Day, in a 2002 letter to the UN Committee on Economic Social and Cultural Rights, reported the B.C. government's planned legal aid cutbacks as a violation of the *ICESCR*.

Changes to legal aid violate Article 2(2) [of the *ICESCR*]. ...the targeted elimination of legal aid for most family law matters and for poverty law, as well as the elimination of funding to community advocates for women and low-income people, and the cut to the

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<sup>9</sup> International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee CANADA CCPR/C/CAN/CO/5, 20 April 2006, para. 11.

[http://www.unhchr.ch/tbs/doc.nsf/0/7616e3478238be01c12570ae00397f5d/\\$FILE/G0641362.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/7616e3478238be01c12570ae00397f5d/$FILE/G0641362.pdf)

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para.23

<sup>12</sup> CRC/C/GC/10, para.49

budget of the BC Human Rights Commission, deprives members of the most disadvantaged groups of the means to seek remedies for social rights violations. ...If members of the most socially and economically disadvantaged groups cannot effectively exercise their rights before human rights...because there is no legal representation available to them, the central obligation to give effect to the rights is contravened.<sup>13</sup>

28. Four years later the Committee agreed. In May 2006, the Committee on Economic, Social and Cultural Rights, reviewing Canada's fulfillment of rights enshrined in Covenant, noted "inadequate availability of civil legal aid" particularly for economic and social rights as a contributing factor to lack of redress available to individuals. The Committee expressed particular concern with cuts to civil legal aid in British Columbia concluding, "This leads to a situation where poor people, in particular poor single women, who are denied benefits and services to which they are entitled to under domestic law, cannot access domestic remedies." The Committee recommended, "...that [Canada] ensure that civil legal aid with regard to economic, social and cultural rights is provided to poor people in the provinces and territories, and that it be adequate with respect to coverage, eligibility and services provided."<sup>14</sup>

## **B.6 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

29. CEDAW was ratified by Canada 10 December 1981.<sup>15</sup> CEDAW has been ratified by 186 States Parties. Under CEDAW Canada and British Columbia are obliged to ensure the legal protection of women on an equal basis (Article 2) and must provide civil legal aid necessary to the fulfilling of that obligation.

30. The UN Committee on the Elimination of Discrimination Against Women in its 2008 review of Canada's enforcement of rights protected by CEDAW, noted that cuts to civil legal aid—particularly in BC—effectively deny equality rights to low-income women.

The Committee is concerned at reports that financial support for civil legal aid has diminished and that access to it has become increasingly restricted, in particular in British Columbia, consequently denying low-income women access to legal representation and legal services. The Committee also notes with concern the fact that the State party's Court Challenges Programme, which facilitated women's access to procedures to review alleged violations of their right to equality, was cancelled, and it regrets the absence of concrete reasons in the budget review and assessment that led to that cancellation.<sup>16</sup>

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<sup>13</sup> Gwen Brodsky and Shelagh Day of the Poverty and Human Rights Project in a February 11, 2002 letter to the Chairperson Virginia Dandan of the U.N. Committee on Economic, Social and Cultural Rights.

<sup>14</sup> Consideration Of Reports Submitted By States Parties Under Articles 16 And 17 Of The Covenant: Concluding observations of the Committee on Economic, Social and Cultural Rights CANADA, E/C.12/CAN/C0/4, E/C.12/CAN/C0/5, 22 May 2006, para. 43.

<sup>15</sup> Convention on the Elimination of All Forms of Discrimination against Women, entry into force, 3 September 1981, UN Treaty Series, no. 1249, p. 13.

<sup>16</sup> Concluding Observations of the Committee on the Elimination of Discrimination against Women, 42<sup>nd</sup> Session, 10 October – 7 November 2008, para. 21.

31. The Committee urged Canada act to improve legal aid throughout Canada, particularly for family and poverty law, to ensure access to remedies for discrimination on the basis of sex, especially in family and poverty law.

## **B.7 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)**

32. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)<sup>17</sup> has been ratified by 173 States Parties, including Canada which ratified it 14 October 1970. The ICERD also imposes a duty to provide legal aid when it is necessary to do so to ensure the enjoyment by all of protected rights. The UN Committee on the Elimination of Racial Discrimination, in its May 2007 review of Canada's compliance with ICERD noted the failure to adequately provide access to justice for Aboriginal peoples, African Canadians and persons belonging to minority groups particularly in view of the September 2006 cancellation of the Court Challenges Program that had enabled test cases on issues involving the equality of disadvantaged groups.<sup>18</sup>

## **C. United Nations Declarations and Statements of Principles**

33. While UN Declarations and Statements of Principles are not binding on United Nations member States, they provide important sources for interpreting and understanding States' international legal obligations as well as important normative guidance for States in developing domestic public policy that complies with generally accepted international human rights standards and principles.

### **C.1 Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems**

34. On December 20, 2012, the UN General Assembly adopted the *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* by unanimous consent.<sup>19</sup> The *Principles and Guidelines* are the first international instrument to deal exclusively with legal aid.

35. Drawn from international standards and good practice, the *Principles and Guidelines* give guidance on the fundamental principles on which a legal aid system should be based. They spell out the elements needed for an effective and sustainable national legal aid system.

36. Guideline 9 emphasizes the role of gender in the legal aid context. It encourages States to incorporate a 'gender prospective into its policies, laws, procedures and practices relating to legal aid to ensure gender equality and equal and fair access to justice.'"

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<sup>17</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*

Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

<sup>18</sup> Committee on the Elimination of Racial Discrimination Seventieth Session 19 February - 9 March 2007, CERD/C/CAN/CO/18, 25 May 2007, <http://www.unhcr.org/refworld/publisher.CERD./CAN.465fe0082.0.html>

<sup>19</sup> UN General Assembly, *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems : resolution / adopted by the General Assembly* , 28 March 2013, A/RES/67/187.

37. The Special Rapporteur on the Independence of judges and lawyers,<sup>20</sup> in commenting on the *Principles and Guidelines*, considered that “ the aim of legal aid is to contribute to the elimination of obstacles and barriers that impair or restrict access to justice by providing assistance to those otherwise unable to afford legal representation and access to justice.”<sup>21</sup>

38. The Special Rapporteur was also of the view that

...the right to legal aid can be construed as both a right and an essential guarantee for the effective exercise of other human rights, including the right to an effective remedy, the right to liberty and security of the person, the right to equality before the courts and tribunals, the right to counsel and the right to a fair trial. Owing to its importance and potential scope, the right to legal aid should be recognized, guaranteed and promoted in both criminal and non-criminal cases.<sup>22</sup>

## C.2 Basic Principles on the Role of Lawyers<sup>23</sup>

39. These *Principles* provide specific substance to the due process guarantees recognized in the *Universal Declaration of Human Rights* and in Covenants Canada has ratified, such as the *International Covenant on Civil and Political Rights*. They provide a concise description of international norms relating to the key aspects of the right to independent counsel.

40. The Preamble and Articles 2, 3 & 6 of the Basic Principles on the Role of Lawyers articulate the duty to protect human rights, ensure equal access to lawyers and provide sufficient funding for legal services to the poor.

Whereas adequate protection of human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.

### Access to Lawyers and legal services

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property birth, economic or other status.”

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

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<sup>20</sup> Report of the Special Rapporteur on the independence of judges and lawyers, A/HRC/23/43. 15 March 2013.

<sup>21</sup> Ibid, para.27, p.6.

<sup>22</sup> Ibid, para.28, p.6.

<sup>23</sup> Adopted by the 8<sup>th</sup> United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana 27 August - 7 September 1990. U.N. Doc. A/CONF. 144/28/Rev. 1 at 188. (1990), <http://www2.ohchr.org/english/law/lawyers.htm>

Special safeguards in criminal matters

6. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

### **C.3 Body of Principles for the Protection of all Persons under any Form of Detention of Imprisonment<sup>24</sup>**

41. These principles were adopted by the General Assembly of the United Nations by resolution on 9 December 1988 and include the right to legal representation provided by the state.

Principle 17

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

### **C.4 Resolution on Human Rights in the Administration of Justice**

42. In 2002 the United Nations General Assembly passed a resolution affirming the responsibility of governments to adequately fund legal aid in order to promote and protect human rights. The resolution emphasized, "...that the right to access to justice as contained in applicable international human rights instruments forms an important basis for strengthening the rule of law through the administration of justice...", and called on governments to

...allocate adequate resources for the provision of legal-aid services with a view to promoting and protecting human rights, and invites the international community to respond favourably to requests for financial and technical assistance for the enhancement and strengthening of the administration of justice.<sup>25</sup>

43. It is noteworthy that this resolution passed in the General Assembly "without a vote," which means there was no dissent by any Member State of the United Nations.

## **D. Regional Human Rights Declarations and Conventions**

### **D.1 European Convention for the Protection of Human Rights and Fundamental Freedoms. (ECHR)<sup>26</sup>**

44. The ECHR is an international treaty drafted by the Council of Europe to protect human rights and fundamental freedoms in Europe. It was entered into force on 3 September 1953. It is binding on all members of the Council (currently 47 member states). The Convention also established the European Court of Human Rights (ECtHR). Any person who feels his or her rights under the ECHR have been violated by a state party can take a case to the European Court

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<sup>24</sup> G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

<sup>25</sup> General Assembly Resolution on Human rights in the administration of justice 20 February 2002, A/RES/56/161.

<sup>26</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

of Human Rights (ECtHR). Judgments finding violations are binding on the State concerned and they are obliged to execute them.

45. The ECHR Preamble provides "...Being resolved as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration."

46. Article 6. 1 of the ECHR provides that in the determination of civil rights and obligations or of any criminal charges, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Under Article 6.3(d), everyone charged with a criminal offense has the right to defend himself in person or through legal assistance of their own choosing or, if they do not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

47. Although Article 6 does not expressly require States to provide free legal aid in civil cases, the ECtHR has found that the right to access to a court contained in Article 6(1) encompasses the right to free legal assistance in civil matters of indigent applicants when such assistance proved indispensable for effective access to the courts and a fair hearing.

48. In *Golder v. United Kingdom*,<sup>27</sup> applying the Vienna Convention on the Law of Treaties and general principles of international law, the ECtHR found that the ECHR Article 6(1) guarantee of the right to a fair trial must be considered to include the right to access to the courts in civil as well as in criminal matters. The applicant, a prisoner, had been denied the right to consult a lawyer for the purpose of bringing a civil libel action concerning an accusation that he assaulted a prison officer during a disturbance in the recreation area of the prison.

49. In the case of *Airey v. Ireland*,<sup>28</sup> applying and expanding upon the right to access to the courts established in its decision in *Golder*, the Court found that Article 6(1) also implies the right to free legal assistance in certain civil cases. The Court ruled that the right applies in civil cases when such assistance proves indispensable for effective access to the courts, because of the complexity of the procedure, the complexity of the issues of law, and the need to establish facts through use of expert evidence and examination of witnesses.

50. The Court noted, however, that the right to access to a court is not absolute and may be subject to legitimate restrictions. These include the imposition of financial contributions and a requirement that the case be well-founded and not vexatious or frivolous.

51. The Court also noted that

. . . whilst Article 6 (1) guarantees to litigants an effective right of access to the courts for the determination of their 'civil rights and obligations,' it leaves to the state a free choice of the means to be used towards this end. The institution of a legal aid scheme... constitutes one of those means but there are others such as, for example, a simplification of procedure. In any event, it is not the Court's function to indicate, let alone dictate, which measures should be

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<sup>27</sup> Judgment of February 21 1975.

<sup>28</sup> Judgment 9 October 1979.

taken; all that the Convention requires is that an individual should enjoy his effective right of access to the courts in conditions not at variance with Article 6(1).<sup>29</sup>

52. A more recent decision of the ECtHR is *Steel and Morris v. United Kingdom*.<sup>30</sup> In that case, the Court considered whether the refusal to provide free legal counsel to the defendants in a defamation action amounted to a violation of Article 6(1) CPHRFF. The Court concluded that the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the court.

53. In its reasons, the Court said:

The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see *Airey*, pp. 12-14). It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side (see, other examples, *De Haes and Gijssels v. Belgium*, judgment of 24 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 238, § 53).

54. The Court also pointed out that the State is free to choose the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure.

## **F. Inter-American Human Rights System (IAHRS)**

55. The Organization of American States, comprised of 35 member states, was formed in April 1948; Canada became a permanent observer in 1972 and joined as a member state 8 January 1990.

### **E.1 Charter of Organization of American States (OAS)**

56. Canada has not ratified the *Inter-American Convention on Human Rights*,<sup>31</sup> but is bound by the *American Declaration on the Rights and Duties of Man* and by the legal norms and provisions required to conform to the Charter of the OAS.<sup>32</sup> Canada ratified the OAS Charter on January 8, 1990, and under Article 45, member states agree to dedicate every effort to the adequate provision for all persons to have due legal aid in order to secure their rights.

#### Article 45

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:

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<sup>29</sup> For a more detailed discussion of the ECtHR jurisprudence on the right to legal aid, see: [www.legalreform.org/european-court-human-rights](http://www.legalreform.org/european-court-human-rights)

<sup>30</sup> ECtHR, Judgment, 15 May 2005.

<sup>31</sup> American Convention on Human Rights, OAS. San Jose, (1969).

<sup>32</sup> Charter of the Organization of American States, as amended 1967, 1985, 1992, 1993.

...

- (i) Adequate provision for all persons to have due legal aid in order to secure their rights.

## **E.2 American Declaration on the Rights and Duties of Man**

57. The *American Declaration on the Rights and Duties of Man*, adopted by the member states of the OAS in 1948, provides, *inter alia*, for the right to a fair trial. Article XXVI provides for due process guarantees, and Article II guarantees equality before the law.

Article XVIII. Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXVII. Every person is presumed to be innocent until proved guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

58. The Inter-American Court of Human Rights (IACtHR) confirmed in a 1990 Advisory Opinion that indigence and the inability to access effective legal representation may enable a petitioner to establish that they have been unable to invoke and exhaust their domestic remedies, such that their petitions should be found admissible.<sup>33</sup>

## **E.3 American Convention on Human Rights**

59. While Canada has not ratified the *American Convention on Human Rights*, its provisions are worth examining. The Convention entered into force 18 July 1978 and recognizes States' obligation under Article 1 to respect the full and free exercise of the rights and of all subject to their jurisdiction, as well as the right to equal protection of the law (Article 24):

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for the reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

60. The Convention also provides due process guarantees (Article 8) and effective recourse through the right to judicial protection (Article 25):

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<sup>33</sup> I/A Court H.R., *Exceptions to the Exhaustion of Domestic Remedies* (Arts. 46(1), 46(2) (a) and 46(2) (b) American Convention on Human Rights). Advisory Opinion OC-11/90 of August 10, 1990. Series A No. 11

## Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
  - a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;
  - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
  - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
  - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
  - g. the right not to be compelled to be a witness against himself or to plead guilty; and
  - h. the right to appeal the judgment to a higher court.

## Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
  - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
  - b. to develop the possibilities of judicial remedy; and
  - c. to ensure that the competent authorities shall enforce such remedies when granted.

### **E.3 Inter-American Commission of Human Rights (IACHR)**

61. Established in 1959, the Inter-American Commission on Human Rights (IACHR) is the principal organ of the Organization of American States (OAS) charged with promoting the observance and protection of human rights and to act as a consultative organ of the OAS in human rights matters.

62. One of the Commission's functions is to receive and take action on petitions and other communications lodged by any person or group of persons or any non-governmental entity

legally recognized in one or more of the member states of the Organization, alleging violations of human rights.

63. It exercises this jurisdiction in two principal respects. With respect to State Parties to the American Convention on Human Rights (IACHR), the Commission is mandated to act on petitions containing denunciations or complaints of violations of the Convention by a State Party.

64. As to OAS members not parties to the American Convention, the Commission has jurisdiction to receive and examine communications that contain complaints of alleged violations of human rights set forth in the American Declaration based upon the ratification by those states of the OAS Charter.

65. Thus individual Canadians may not petition the IACtHR (since Canada has not ratified the Convention), but may petition the IACHR for violations of the American Declaration.

66. The IACHR has not only recognized a general standard with respect to the obligation of a state to provide free legal aid to indigent persons, but has also identified the criteria when such legal aid will be provided.

67. In its *Report on Terrorism and Human Rights*,<sup>34</sup> the IACHR noted that

both the Commission and the Inter-American Court have observed in this respect that in criminal proceedings and those relating to rights and obligations of a civil, labor, fiscal or any other nature, an indigent has the right to legal counsel free of charge where such assistance is necessary for a fair hearing.

68. The factors that bear on the determination of whether free legal representation is necessary for a fair hearing include the resources available to the person concerned, the complexity of the issues involved, and the significance of the rights involved.<sup>35</sup>

69. The IACHR has considered that the case law of the IACtHR is applicable to its deliberations even with respect to states such as Canada not party to the American Convention. In *Andrew Harte and Family v. Canada*,<sup>36</sup> the petitioner claimed that he was denied access to justice for economic reasons. He claimed exemption from the requirement to exhaust his domestic remedies in Canada.

70. The IACHR referred to and applied the IACtHR Advisory Opinion OC-11-90<sup>37</sup> in which the Court construed the exceptions to the exhaustion of domestic remedies under Articles 46(1), (2) (a) and (2) (b) of the *American Convention* with particular regard for petitioners who may be denied access to domestic remedies due to indigence or lack of access to legal assistance.

71. The IACHR considered that the case law of the IACtHR was applicable to Canada as a member state of the OAS having particular regard for the Court's views of the *American*

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<sup>34</sup> IACHR, Report on Terrorism and Human Rights, 2 October 2002. Para. 236.

<sup>35</sup> Ibid, para. 341.

<sup>36</sup> IACHR, Report No. 81/05. 24 October 2005.

<sup>37</sup> IACtHR, Advisory Opinion, OC-11/90. 10 August 1990.

*Declaration* as a source of obligations for member States of OAS.

72. This principle was affirmed by the Court in its 2003 Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants*.<sup>38</sup> In its opinion, the Court stated

...should the Court restrict its ruling to those States that have ratified the American Convention, it would be difficult to separate this Advisory Opinion from a specific ruling on the legislation and practices of States that have not ratified the Convention with regard to the questions posed.

The Court considers that this would restrict the purpose of the advisory proceeding, which, as has been mentioned, “is designed [...] to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States.

Likewise, if the opinion only encompassed those OAS Member States that are parties to the American Convention, the Court would be providing its advisory services to a limited number of American States, which would not be in the general interest of the request.

Consequently, the Court decides that everything indicated in this Advisory Opinion applies to the OAS Member States that have signed the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols.

#### **E.4 Inter-American Court of Human Rights (IACtHR)**

73. The OAS established the IACtHR in 1979 to enforce and interpret the provisions of the American Convention on Human Rights. Its two main functions are adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred to it. Under the latter, it issues opinions on matters of legal interpretation brought to its attention by other OAS bodies or member states.

74. Under the American Convention, cases can be referred to the IACtHR by either the IACHR or a state party to the Convention. Individual citizens of the OAS member states cannot take cases directly to the IACtHR.

75. The IACtHR has determined that a state’s failure to provide the legal aid necessary to enable the effective exercise of a form of legal recourse renders that recourse illusory and that this constitutes a violation by the state of Articles 8 and 25, in conjunction with Article 1.1.<sup>39</sup>

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<sup>38</sup> Advisory Opinion OC-18/03, paras. 58-60.

<sup>39</sup> *Case of Hilaire, Constantine and Benjamin et al., v. Trinidad and Tobago*, Judgment of June 21, 2002.

76. The IACtHR has also ruled that to achieve ‘due process of law’, “a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants”.<sup>40</sup> The Court further recognized in the aforementioned Advisory Opinion that:

To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defence of one’s interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.<sup>41</sup>

77. Drawing on these principles to reach its finding that Articles 8 and 25 were violated, the IACtHR in *Hilaire*<sup>42</sup> concluded: “In order to protect the right to effective recourse, established in Article 25 of the Convention, it is crucial that the recourse be exercised in conformity with the rules of due process, protected in Article 8 of the Convention, which include access to legal aid.”

## **E.5 The Legal Assistance Fund of the Inter-American System of Human Rights**

78. In 2008, the OAS General Assembly created the Legal Assistance Fund of the Inter-American System of Human Rights and entrusted the OAS Permanent Council with establishing its rules of procedure.<sup>43</sup> The fund was created to facilitate access to the Inter-American Human Rights System by those persons who lack the resources to bring their cases before the system.

79. The Fund consists of two separate accounts: one for the IACHR and the other for the IACtHR. On 4 February 2010 (in force 1 June 2010) the Court adopted the Rules for the Operation of the Victims Legal Assistance Fund of the Court.<sup>44</sup> The Commission adopted Rules for the Operation of the Fund which came into force on 1 March 2011.<sup>45</sup> The Fund is currently comprised of voluntary capital contributions from OAS member states, the permanent observer states and other states and donors who may wish to contribute to the Fund.

80. There is other regional law that is instructive to demonstrate the development of consistent international legal norms requiring States to provide adequate legal aid for the protection of internationally protected human rights. The *Charter of Fundamental Rights of the European Union*<sup>46</sup> and the *African Charter on Human and People’s Rights*<sup>47</sup> contain provisions

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<sup>40</sup> I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 117.

<sup>41</sup> *Ibid*, para. 119.

<sup>42</sup> *Supra* footnote 38 at para. 148.

<sup>43</sup> AG/RES/ 2426 (xxxviii-O/08 GA Resolution, 3 June 2008).

<sup>44</sup> Rules of Procedure of the Legal Assistance Fund. 4 February 2010.

<sup>45</sup> Rules of Procedure of the Legal Assistance Fund 1 March 2011.

<sup>46</sup> Charter of Fundamental Rights of the European Union, Official Journal of European Communities 18 December 2000 (OJC 364/01)

<sup>47</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

guaranteeing rights to equality before the law, effective remedies for human rights violations and to fair trials in the determination of rights.

## **F. Universal Periodic Review**

81. The Universal Periodic Review (UPR) is a process adopted in 2006 by which the UN Human Rights Council conducts a quadrennial review of each Member State's fulfillment of human rights obligations and commitments arising from the UN Charter, the Universal Declaration of Human Rights and the instruments to which each State is a party. The UPR review is based on three reports: the state's report, the report of nongovernmental organizations (NGOs) as summarized by the Office of the High Commissioner for Human Rights (OHCHR) and a summary of information prepared by the OHCHR. The Report of the Working Group on the UPR of Canada conducted in 2009, noted access to justice problems for victims of domestic violence and for aboriginal people and recommended that Canada, "Take effective measures to combat and put an end to discrimination against indigenous population and...ensure effective access to justice, establish immediate means of redress and protection of rights of ethno minorities, in particular, Aboriginals."<sup>48</sup>

## **G. Commonwealth Secretariat<sup>49</sup>**

### **G.1 Latimer House Guidelines<sup>50</sup>**

82. The Latimer House Guidelines for the Commonwealth were developed to renew and enlarge on the commitments made by Canada and other Commonwealth countries to the rule of law and the attendant safeguards and restrictions set out in the Harare Declaration<sup>51</sup>.

83. On 19 June 1998, Canada approved the Latimer House Guidelines that include a resolution that member governments have a responsibility to provide legal aid to indigent litigants and to fund public interest advocates.

#### Article VII.4

Adequate legal aid schemes should be provided for poor and disadvantaged litigants, including public interest advocates.

## **CONCLUSION**

84. This submission identifies the basic international human rights law establishing the responsibility of states to ensure access to justice for everyone without discrimination as to economic, social or other status. The references cited amply demonstrate that the state's responsibility to provide legal aid as affirmed by UN and regional instruments, jurisprudence and rulings.

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<sup>48</sup> Report of the Working Group on the Universal Periodic Review Canada, A/HRC/11/17, 5 October 2009, para. 28.

<sup>49</sup> The Commonwealth Secretariat is a voluntary association of 54 countries mandated to work together towards shared goals in democracy and development. Canada has been a member since 1931.

<sup>50</sup> The Latimer House Guidelines for the Commonwealth published June, 1998.

<sup>51</sup> The Harare Declaration is the Commonwealth's second general statement of beliefs and was issued by Commonwealth Heads of Government at their meeting in Zimbabwe in 1991.

All of which is respectfully submitted by Lawyers Rights Watch Canada.

Lawyers Rights Watch Canada (LRWC) is a committee of lawyers who promote human rights and the rule of law internationally by protecting advocacy rights. LRWC campaigns for advocates in danger because of their human rights advocacy, engages in research and education and works in cooperation with other human rights organizations. LRWC has Special Consultative status with the Economic and Social Council of the United Nations.

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